

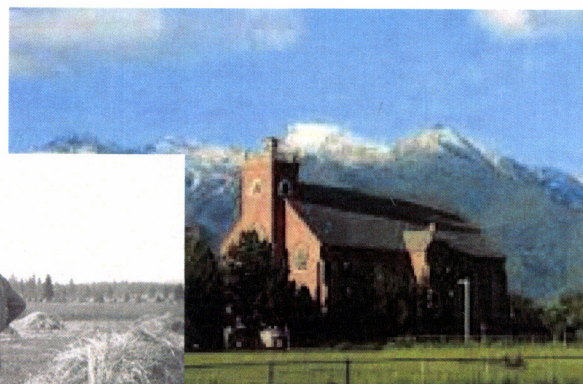
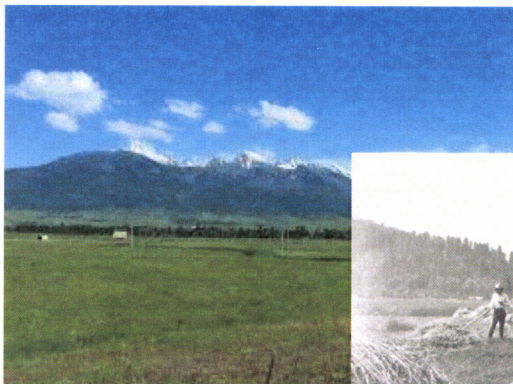
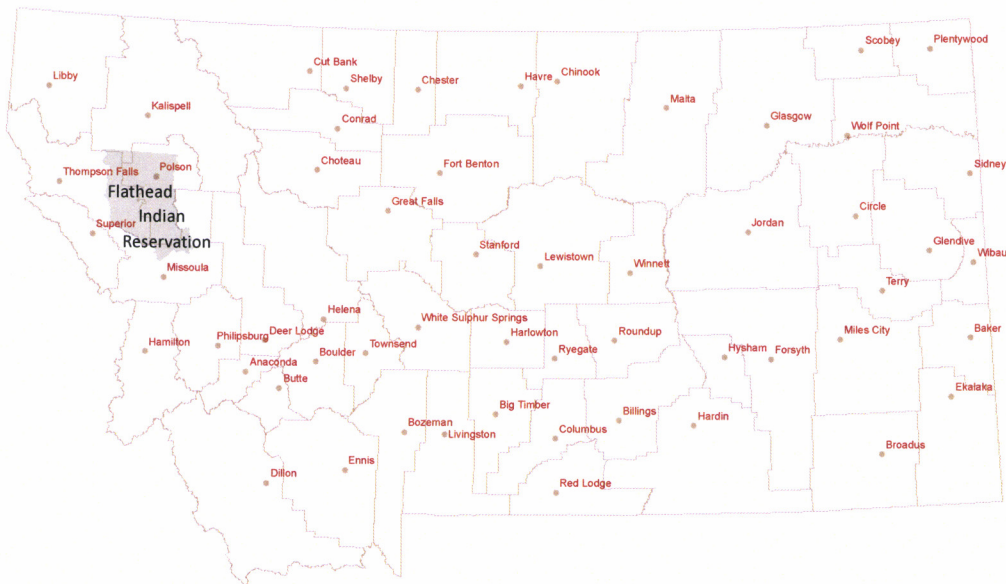
CSKT-Montana Water Compact

House Bill No. 629

Introduced by Representative Kathleen Williams

By Request of the Reserved Water Rights Compact Commission

March 27, 2013
House Judiciary Committee



MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION

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Working to “conclude compacts for the equitable division and apportionment of waters between the State and its people and the several Indian Tribes claiming reserved water rights within the state,” and “between the State and its people and the federal government claiming non-Indian reserved waters within the state” (85-2-701, 703)

- **Montana’s Reserved Water Rights Compact Commission (RWRCC)** was established by the Montana Legislature in 1979 as part of the state-wide general stream adjudication process (85-2-701, MCA). The RWRCC is attached to the Department of Natural Resources & Conservation for administrative purposes. The Commission is scheduled to sunset on July 1, 2013.
- **The RWRCC is composed of nine members.** Four members are appointed by the Governor, one member is appointed by the Attorney General, two members are appointed by the President of the Senate and two members are appointed by the Speaker of the House of Representatives. A professional and technical staff of five supports the RWRCC including the staff director, one attorney, an agricultural engineer, one hydrologist, and a GIS specialist. The staff is scheduled to transfer to the DNRC to conduct compact implementation tasks upon sunset of the Commission.
- **The RWRCC is authorized to negotiate settlements** with federal agencies and Indian tribes that claim federal reserved water rights within the State. A federal reserved water right is a right to use water that is implied from an act of Congress, a treaty, or an executive order establishing a tribal or federal reservation. The amount of water to which a reservation is entitled depends on the purpose for which the land was reserved. In Montana, reserved water rights have been claimed for seven Indian reservations, for allotments for the Turtle Mountain Chippewa Tribe, for national parks, forests, and wildlife refuges, and for federally designated wild and scenic rivers.
- **The claims of the tribes and the federal agencies are suspended from adjudication** in the Montana Water Court while they are being negotiated by the RWRCC (85-2-217 MCA). Settlements negotiated by the RWRCC on behalf of the State are ratified by the Montana Legislature and the Tribes and approved by the appropriate federal authorities. In some instances, approval by the U.S. Departments of Justice and the Interior will be sufficient. In other cases, where federal authorization or federal appropriations are needed to implement provisions of the settlement, Congressional approval will be required.
- **Citizen participation** is an essential element of each negotiation and insures that the RWRCC’s deliberations on behalf of the State address the concerns of the public and incorporate local solutions to water use problems. The negotiations are open to the public and additional public meetings are held during initial stages of negotiations and again when negotiations are nearing completion. Public comment may be submitted during the legislative phase and finally, objections may be made to the Montana Water Court prior to the incorporation of a compact into a basin decree.

COMPLETED COMPACTS

(Dates of passage and approval by Montana Legislature)

Fort Peck Tribe –Assiniboine and Sioux
May 1985, 85-20-201, MCA

Northern Cheyenne Tribe
September 1992, 85-20-301, MCA
Congress: P.L. 102-374 (1992)

U.S. Department of the Interior, National Park Service
Jan. 1994, 85-20-401, MCA
Yellowstone National Park
Glacier National Park
May 1995
Little Bighorn Battlefield National Monument
Big Hole National Battlefield
Bighorn Canyon National Recreation Area

U.S. Department of the Interior, Bureau of Land Management
September 1997, 85-20-501, MCA
Upper Missouri National Wild and Scenic River
Bear Trap Canyon Public Recreation Site

Rocky Boy's Reservation – Chippewa Cree Tribe
April 1997, 85-20-601, MCA
November 1999, Congress: P.L. 106-163

U.S. Department of the Interior, Fish and Wildlife Service
July 1997, 85-20-701, MCA
Black Coulee National Wildlife Refuge
Benton Lake National Wildlife Refuge
April 1999, 85-20-801, MCA
Red Rock Lakes National Wildlife Refuge
March 2007, 85-20-1301, MCA
Bowdoin National Wildlife Refuge
April 2009, 85-20-1601
National Bison Range

Crow Tribe
June 1999, 85-20-901, MCA Special Legislative Session
Congress: Claims Resolution Act of 2010

Fort Belknap - Gros Ventre and Assiniboine
April 2001, 85-20-1001, MCA

U.S. Department of Agriculture, Agriculture Research Service
March 2007, 85-20-1101, MCA
Fort Keogh Livestock and Range Research Laboratory
March 2007, 85-20-1201, MCA
Sheep Experiment Station

U.S. Department of Agriculture, Forest Service
April 2007, 85-20-1401, MCA

Blackfeet Tribe
2009, 85-20-1501, MCA

COMMISSIONERS

(Four-year terms)

Chris Tweeten, Chairman
Attorney General's Office appointee 2011

Richard Kirn
Governor's appointee 2011

Gene Etchart
Governor's appointee 2011

Dorothy Bradley
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Mark DeBruycker
Governor's appointee 2011

Representative Kathleen Williams
House Speaker appointee 2012

Representative Daniel Salomon
House Speaker Appointee 2011

Senator Debby Barrett
Senate President Appointee 2011

Senator Dick Barrett
Senate President Appointee 2012

SUMMARY - IMPLEMENT NEGOTIATED WATER COMPACTS WITH MONTANA TRIBAL GOVERNMENTS;**CSKT – MONTANA WATER RIGHTS COMPACT**

- The CSKT –Montana Compact consists of two main components: the Compact, and the Unitary Management Ordinance. The Compact quantifies the Tribes right and sets forth the conditions on their use; the Ordinance fills the existing on-Reservation regulatory void and provides a joint State-Tribal body to administer all water rights on the Reservation. A third document, the Flathead Indian Irrigation Project (FIIP) Water Use Agreement (WUA) addresses the use of the water rights for the FIIP (*not* private rights held by irrigators personally) and CSKT instream flow rights for streams also supplying the FIIP. The WUA is a separate agreement among the FIIP, the Tribes, and the United States. It does not require legislative approval. However, the Compact cannot be fully administered without a WUA. Aspects of an earlier draft of the WUA are presently being litigated. This bill is made subject to approval of the WUA by the FJBC with a contingent effectiveness clause.
- This document summarizes the Compact. The Compact:
- Completely protects all current water users of non-irrigation rights in all water basins on- and off-reservation from the Tribes' exercise of their senior water rights.
- Will protect on-reservation irrigators within the FIIP through the WUA. See attached summary of the WUA.
- Protects non-project on-reservation irrigators in one of two ways: 1) by providing protection from call for an amount of water use similar to that provided for FIIP irrigators; or 2) through specific limitations on the enforceable levels of tribal instream flow rights to ensure protection of irrigation rights decreed in the Adjudication. The applicable mechanism depends on the geographical location of the water rights protected.
- Establishes a Unitary Management Ordinance to govern the administration and enforcement of all water rights within the boundaries of the Flathead Reservation. See attached summary of Ordinance.
- Provides water for the Tribes for existing and future tribal water needs, both consumptive and instream flow, to settle for all time the Tribes' claims to reserved water rights.
- Provides for an allocation of water from the Flathead River, including 90,000 acre-feet of water stored in Hungry Horse Reservoir, for the Tribes to use or lease within the State of Montana, of which 11,000 acre-feet must be made available for lease for off-reservation mitigation of new or existing uses.
- Provides a process for the Tribes to lease portions of their water rights within the State of Montana.
- Does not change any off-reservation jurisdictional arrangement (e.g, for quantification or issuance of water rights, water quality, species management) – which remain as they presently are under state law.
- Settles off-reservation instream flow rights for the Tribes, to which they have strong legal claims as a result of particular language in the 1855 Hellgate Treaty (the right to "take fish" in the Tribes' "usual and accustomed" locations). Federal case law interprets this treaty language to include water rights outside the reservation to maintain fisheries flows.
- CSKT are the only tribes in Montana with treaty language supporting off-reservation instream flow water rights. This settlement is not a precedent for other Montana tribes to seek to reopen their settlements to assert off-reservation water rights claims. There is specific language in this settlement on this point.
- Secures, in exchange for the rights and benefits recognized by the Compact, the waiver and relinquishment of all other reserved water rights claims the Tribes could otherwise make in Montana, including the vast majority of their potential off-reservation claims both west and east of the Continental Divide.

CSKT WATER RIGHTS-ON RESERVATION

- On-reservation instream flow rights recognized at specific measurement points. These rights are quantified in detail in Compact appendices 10, 11 and 12.
- FIIP right recognized as part of Tribal Water Right, eliminating need for a Water Court dispute over competing claims filed by US and FJBC. Exercise of FIIP right is subject to WUA. If the WUA is not ratified, the Montana Legislature's approval of the Compact will not be effective.

- Water right from mainstem of Flathead River ("Flathead System Compact Water") of 229,000 acre feet for future development or lease, including 90,000 acre-feet from Hungry Horse.
- The right to maintain the level of Flathead Lake at a minimum pool elevation of 2883 feet above mean sea level. This right does not allow the Tribes to divert water from or draw the lake level down below level stated, either presently or in the future. This right does not change how Lake levels are managed.
- Water rights for wetlands and high mountain lakes located on Tribal trust lands.
- Water right for Boulder Creek and Hellroaring hydroelectric projects (tribally owned).
- Water rights co-owned with MFWP or USFWS (as applicable) for wetlands on lands owned by MFWP/USFWS. Co-ownership does not convey any land management authority.
- Water rights for tribal religious and cultural uses and other existing tribal uses confirmed.
- Compact does not affect Kerr Dam water rights, which are state law-based water rights whose ownership is subject to the terms of the Kerr Dam FERC license and whose attributes will be as finally decreed by the Montana Water Court in the Adjudication.

CSKT WATER RIGHTS-OFF RESERVATION

- Off-reservation time immemorial instream flow rights on mainstems of Kootenai, Swan and Lower Clark Fork Rivers and Placid Creek. Limitations on enforcement of these rights provided in the Compact. Rights set at levels that protect existing uses and allow for future growth.
- Instream rights on four Kootenai River tributaries that lie wholly within National Forest boundaries.
- Co-ownership of various water rights held by MFWP in Bitterroot, Flathead and Blackfoot River Basins, as listed in Appendix 28 and 29.
- Co-ownership with MFWP of former Milltown Dam water right. Change in purpose of that right from hydro to fisheries made by legislative approval of Compact. Right retains 1904 priority. 10 year deferral of enforcement. Additional protections included for junior water users. MFWP will have this right whether or not it is included in the Compact.
- Beneficial interest in contracts for stored water owned by MFWP in the Bitterroot (from Painted Rocks Reservoir and Lake Como). No changes to reservoir management or existing irrigation uses.

CONTRIBUTION TO CSKT SETTLEMENT

- The Compact commits \$55 million State contribution to the CSKT settlement as allocated below:
 - \$30 million to the FIIP to help defray increased pumping costs and for other needs as part of the implementation of the FIIP Water Use Agreement;
 - \$4 million to cost-share stockwater mitigation to replace FIIP stock water deliveries outside irrigation season;
 - \$4 million for improved water measurement;
 - \$4 million to cost-share on-farm efficiency improvements on lands served by FIIP; and
 - \$13 million to Tribes for enhancement of aquatic and terrestrial habitat (part of compromise over settlement of Tribes' on- and off-reservation instream flow water rights claims).
- Federal funding at a level to be set in the federal ratification bill. Funding level set after tribal-federal negotiations and roughly benchmarked to federal programmatic responsibilities and litigation exposure.

INDIAN WATER RIGHTS COMPACT FUNDING

- Authorizes issuance of \$55 million in General Obligation bonds for the CSKT Compact.
- Authorizes issuance of \$14 million in General Obligation bonds for the Blackfeet Compact to pay the state's costs for water-related infrastructure projects provided for in MCA 85-20-1505;
- Authorizes issuance of \$3 million in General Obligation bonds for the Fort Belknap Compact - Peoples Creek minimum flow account, MCA 85-20-1007.

**PROPOSED FLATHEAD INDIAN IRRIGATION PROJECT
WATER USE AGREEMENT SUMMARY**

The Flathead Indian Irrigation Project (FIIP) Water Use Agreement addresses the exercise and administration of both the FIIP water rights (but *not* private rights held by irrigators personally) and the Confederated Salish and Kootenai Tribes' (Tribes) instream flow rights for streams supplying the FIIP. This agreement is being negotiated among the Tribes, the Flathead Joint Board of Control (FJBC) and the United States. The Compact Commission is not a party to these negotiations, but the Water Use Agreement is intended to be attached to the Compact as an appendix, and the Compact makes the Water Use Agreement's conditions binding on the Tribes' exercise of its instream flow and FIIP water rights.

Under Montana law, all water rights in the state are going through a general adjudication. The United States, the FJBC, and the Tribes have competing claims to the water delivered and controlled by the FIIP. Consequently, in the absence of a settlement, the water use associated with the FIIP will be contested through the Montana General Stream Adjudication process to determine whose water rights claims are valid, the priority date of all valid claims, and all the other aspects of such claims. This prospect creates much uncertainty and risk for all parties and indefinitely prolongs the adjudication.

Based on rulings by the U.S. Supreme Court and other Federal Courts, the adjudication process may determine that the instream water rights of the CSKT have a time immemorial priority date and the CSKT consumptive water rights a priority date of 1855. The priority dates for CSKTs' instream flows would be senior to any other water rights on the FIIP and the CSKTs' consumptive use rights' priority date would at least be equal to and in many cases senior to non-tribal irrigation rights.

The Water Use Agreement eliminates this conflict by making the FIIP right part of the Tribal Water Right, meaning all FIIP water users benefit from the Tribes' 1855 priority date. In addition, the Water Use Agreement contains specific protections for the irrigation right from the full exercise of the Tribes' senior instream flow rights, as explained in the points below. The Water Use Agreement does not transfer ownership of any private water rights to the Tribes. All water rights claims filed individually in the Adjudication will be as finally decreed by the Montana Water Court and those decreed rights are entitled to benefit from the protections for existing water rights built into the Compact.

Litigation: The FJBC's legal authority to enter into the Water Use Agreement has been challenged in state district court. On February 15, 2013, Judge C.B. McNeil enjoined the FJBC for entering into the Water Use Agreement. The FJBC has appealed that ruling to the Montana Supreme Court. The Montana Supreme Court granted the FJBC's motion to expedite the appeal. Briefing is currently in progress and will be completed by April 1, 2013. A ruling is expected shortly thereafter. The Montana Supreme Court has stayed Judge McNeil's ruling and all further proceedings in the case pending its resolution of the appeal.

- The proposed agreement protects FIIP irrigators by providing water through two main methods: the **Farm Turnout Allowance (FTA)**, and a **Measured Water Use Allowance (MWUA)**:
 - The FTA is a volume of water that is available to all FIIP lands – up to a maximum of 1.4 acre-feet per acre. The annual FTA will be set each year based on hydrologic conditions (wet, normal, dry).
 - Separate FTAs will be established for the Jocko, Mission and Camas divisions to reflect local conditions.
 - FTAs are phased in as management improvements and rehabilitation and betterment projects funded by the settlement occur. Status quo allocations remain in place until that time.

- The MWUA allows individual irrigators to use water over and above the FTA if they can show through an efficiency audit overseen by the FIIP Operator that the additional water can be efficiently used.

In addition to the FTA and MWUA, the Water Use Agreement protects irrigation uses by allowing for pumping of up to 65,000 acre-feet of water through existing FIIP pumps. This is considerably in excess of the amount historically pumped. An irrigator would be able to purchase additional water through pumping from the Flathead Pumps or from the Tribes' Flathead System Compact Water.

Irrigators who are served by the FIIP and who have Secretarial Water Rights (which are still junior to the Tribes' instream flow rights) will continue to be served by the Project. These irrigators will benefit from the Water Use Agreement on the same basis as other FIIP users – including access to the FTA and MWUA and other related provisions.

The Compact creates a process for irrigators located within the FIIP influence area who have individually-owned water right claims or permits under state law to be protected by entering into voluntary agreements that allow them to use irrigation water up to their historic use or the FTA, whichever is less, without being 'called' by the Tribes' senior instream flow rights.

Deferrals for on-farm quotas and extra-duty water: The Water Use Agreement contemplates rehabilitation and betterment (R&B) of FIIP infrastructure, as well as operational improvements to make the balance work between irrigation uses and instream flows. There is a deferral period before any of the changes contemplated in the Water Use Agreement (including the FTAs) would go into effect. During this deferral period current FIIP water delivery practices remain in place. Changes made as a result of management improvements will be deferred for up to five years after funding is appropriated. Changes as a result of R&B projects will be deferred for up to seven years after funding is appropriated. Federal funding for the operational improvements and R&B projects require passage of Federal legislation, leaving the status quo in place for several additional years.

Protecting Property Rights: As the Water Use Agreement concerns only the FIIP right and the Tribes' instream flow rights, nothing in the agreement affects any private claim filed by a water user in the Adjudication. Those claims will be as they are finally decreed by the Water Court. In addition, nothing in the proposed agreement:

- authorizes any access to private property by any party to the agreement;
- reduces or enhances the legally enforceable right of individual irrigators under the Project to receive irrigation water. A FIIP water user's right to receive irrigation water delivered by the Project Operator is appurtenant to the land and runs with the land and is fully transferable under applicable law
- alters, diminishes, or enhances applicable operating procedures concerning a FIIP irrigator's ability to transfer or marshal, within a FIIP irrigation system operator's administrative area, irrigation water allocated to that irrigator. However, consistent with current law, no water marketing directly between or among FIIP irrigators is allowed.

Improving FIIP Operations and Facilities: Funding for the improvements would come from the United States and the State of Montana as a result of this settlement. The improvements would be designed to bring the greatest possible benefit to CSKT natural resources, FIIP management, the FIIP land base, and the Reservation economy. Without a settlement, funding for these projects would not be available. The State intends to spend \$42 million directly for the benefit of the FIIP as part of its overall \$55 million contribution to the settlement.

SUMMARY
UNITARY MANAGEMENT ORDINANCE
CSKT – MONTANA WATER RIGHTS COMPACT

The Compact establishes a Unitary Management Ordinance (Ordinance) and a State-Tribal Water Management Board (WMB) to govern the administration and enforcement of all water rights within the boundaries of the Flathead Reservation, filling the regulatory void that currently exists on the Reservation as a consequence of a series of Montana Supreme Court decisions.

Some important facts about the Ordinance:

- Applies equally to tribal members and non-members.
- Governs issuance of new water rights and authorizations to change existing water rights, and enforcement.
- Largely but not completely mirrors Montana Water Use Act.
- Cannot be amended unless the Tribes and State jointly agree.
- Does not apply (and the WMB does not have jurisdiction) outside the reservation.

The WMB is composed of five voting members, two appointed by the Governor, two by the Tribes, fifth by the four appointed members. A sixth, non-voting member is appointed by the US. WMB members must live on or do business within the Reservation. A Water Engineer, under the supervision of the WMB, will be responsible for the day-to-day implementation of the Ordinance and the administration of water rights on the Reservation.

Acquiring New Water Rights on the Reservation

The Ordinance provides a process for applying for and receiving new Appropriation Rights or Change in Use Authorizations in a manner that largely mirrors the existing State law processes.

The Ordinance provides for streamlined permitting of small domestic and stock uses.

- Three types of Domestic Allowance: Individual, Shared, and Development. All available with basic application form and strict time frames for approval by the Office of the Engineer. No mitigation requirements.
- Individual and Shared Domestic Allowances – up to 35 gpm & 2.4 acre feet per year (afy) and no measurement requirement.
- Development Domestic Allowance – up to 35 gpm & 10 afy and measurement requirement to protect existing users.
- Three types of Stock Water Allowance: Stock Water Well Allowances, Stock Water Pit Allowances, and Stock Water Tank Served by Surface Water Allowances.
- No mitigation or measurement required.
- Well Allowance is up to 35 gpm & 2.4 afy; Pit Allowance is up to a pit capacity of 5 af and appropriation of 10 afy; Surface Water Allowance is up to 10 gpm and 2.4 afy.

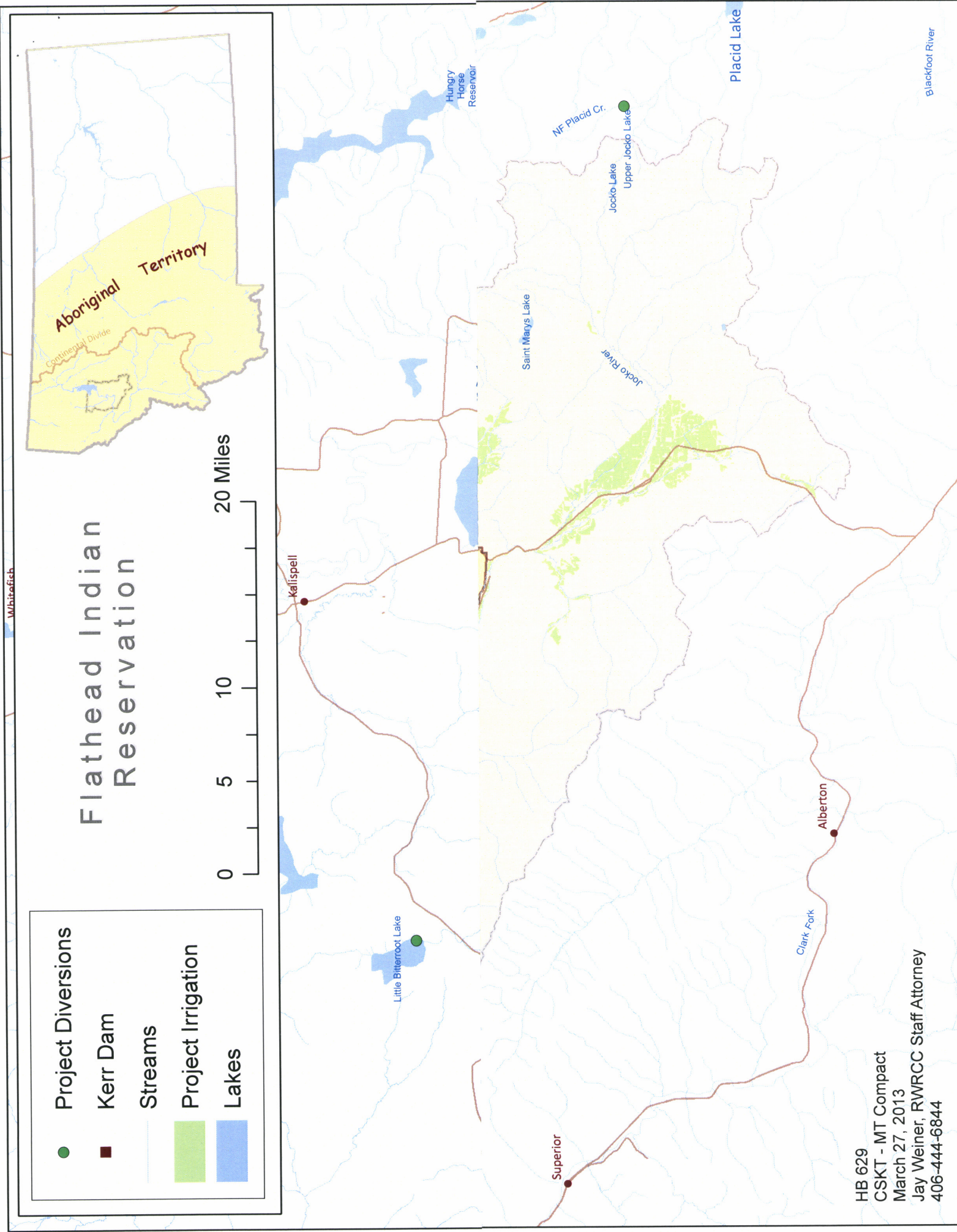
The Ordinance provides specific provisions for permitting redundant and substitute wells, geothermal heating or cooling wells, water for road construction & dust abatement, new uses from Flathead System Compact Water, and wetlands and provides for temporary emergency appropriations.

Documenting Existing Water Rights on the Reservation - Registration Process:

- **No registration is required for valid existing State-based water rights presently on record with the MT DNRC** (claims in the Adjudication, permits issued by DNRC, certificates of water right issued by DNRC).
- **No registration required for those small domestic and stock uses** filed with DNRC since 1996 (on DNRC Form 602 or 605) but 'suspended' due to Montana Supreme Court's removal of DNRC's administrative authority to grant water rights on the Reservation. These uses are automatically protected under the Compact and Ordinance.
- **Registration of existing uses of the Tribal Water Right:** Process for people claiming uses of the Tribal Water Right in existence on the Effective Date of the Compact to register those uses with the WMB. Registration is necessary so those uses may be administered and protected.
- **Registration of certain previously unrecorded uses :** 1) People with pre-1973 domestic or stock uses who did not have to and did not file a claim for those uses in the adjudication; and 2) people with post-1973 domestic or stock uses who did not file completion forms (DNRC Form 602 or 605) with the DNRC. Registration is necessary to protect and administer those uses.

Water Right Enforcement

- The Ordinance creates a process for resolution of disputes between or among water users. Disputes that are exclusively among Flathead Indian Irrigation Project (FIIP) water users remain the responsibility of the FIIP to resolve.
- Enforcement is a user-driven, locally controlled process. Complaints may be lodged with the Water Engineer and decisions appealed to the WMB. Appeal of WMB decisions available to court of competent jurisdiction.
- WMB has authority to appoint water commissioners by unanimous vote of all five voting WMB members. Powers and duties of the water commissioner are defined in the Compact and are similar to State statutes governing water commissioners.



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 March 27, 2013
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CSKT - MT Compact and Off Reservation Water Rights

